AFRICANUS MARPLEH, Principal, and HENRY ROBERTS, Accessory after the fact, Appellants, *v.* REPUBLIC OF LIBERIA, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued March 26, 1969. Decided June 13, 1969.

1. No evidence should be admitted by the trial court which supposes the existence of better evidence as proof.
2. But an error committed by the trial court must be substantially prejudicial to the interests of an aggrieved party, to constitute a ground for reversal by an appellate court.
3. A plea of not guilty in a criminal case, puts in issue every fact the prosecution is bound to prove and enables the defendant to cross-examine a prosecution witness on all matters affecting the determination of guilt or innocence, as well as, of course, on all matters likely to discredit the witness.
4. In all criminal cases, it is incumbent upon the prosecution to prove beyond a reasonable doubt, that is, so no rational doubt of guilt exists, the *corpus delicti,* meaning the criminal act charged, and the identity of the person charged with that crime.
5. The jury is the sole trier of the facts and the sole judge of the guilt or innocence of a defendant.
6. Where a fictitious payee has been fraudulently named in a negotiable instrument, it remains a bearer instrument as to an innocent purchaser for value, and the loss falls upon the agency named as payor, rendering the perpetrator of the fraud criminally liable on the complaint of the payor.
7. An accessory after the fact is one, who after the consummation of a felony, knowing that a felony has been committed, receives, relieves, comforts, or assists the felon, or in any manner aids him to escape arrest or punishment.
8. If an indictment charges a person with being an accessory after the fact, and the evidence at the trial proves him a principal, his conviction will be reversed on the ground of variance of proof, for an essential element of the crime of accessory after the fact is that the felonious act has concluded, since such crime arises only thereafter.

A payroll was prepared for payment of personnel employed by the judiciary, among which were fictitious names and the vouchers for them. Indictments were returned against those alleged responsible, and Africanus Marpleh, coappellant, was named as a principal, charged with grand larceny, and Henry Roberts as an accessory after the fact, in the same crime. The evidence at the

trial clearly indicated their participation in the commission of the fraudulent scheme. The jury found them both guilty, as charged, and an appeal was taken from the judgment entered against them. The *judgment* was *affirmed as to Marpleh,* but *reversed as to Roberts,* and his discharge ordered forthwith, for the variance between the indictment, which charged him with being an accessory after the fact, and the proof, which indicated his involvement in the crime as a principal.

J. Dossen Richards for appellants. *Solicitor General Nelson Wm. Broderick* for appellee.

MR. JUSTICE SIMPSON delivered the opinion of the court.

On an odd day, that is to say, a day that occurs only once every four years, February 29th, in 1968, the Finance Section of the Supreme Court of the Republic of Liberia, prepared payrolls and vouchers for the Debt Court of Nimba County. This payroll headed by Samuel Z. Moore, a judge of the aforesaid court, and the corresponding vouchers, was duly signed by the responsible authority of the judicial branch of government and sent to the Treasury Department for proper processing, which should have culminated in the issuance of government checks for services rendered by the several named payees.

Though the payrolls and vouchers had been unwittingly approved at the Temple of Justice and sent to the Treasury for relevant action, the Bureau of General Accounting and Audits initially permitted the preaudit to be completed without detecting any discrepancy. Subsequently, upon the return to Liberia of the Director of General Accounting, Mrs. Danielette Tucker, another examination was made of the relevant documents, at which time several alarming discoveries were made.

In the first instance, Mrs. Tucker, in her testimony at the trial, stated that, as is the procedure in the Treasury after checks are made, the original documents were re-examined and compared with the checks before signature. In the instant matter, upon comparing the payroll, covering back pay for the months of November and December, 1967, and salaries for January, February, and March, 1968, for the Debt Court of Nimba County, certain discrepancies were found. Mrs. Tucker discovered that the signature of the preauditor did not compare correctly. Besides, the person who signed to verify the existence of the budget appropriation was fictitious, and the initials of all the employees had been forged. In addition to the above, a search of legislative enactments had further disclosed that the act creating the particular Debt Court had not been implemented prior to some of the months that had been included on the payroll.

After making these observations, the Court Administrator was contacted and requested to make available the Court's copy of the payroll for cross-checking purposes. At some time later, when the payroll was scrutinized, it was discovered that certain alterations had been made after the payroll and vouchers had been signed by the authorities of the judicial branch.

When the discovery of these irregularities was made, the matter was turned over to the Department of Justice for action. The County Attorney for Montserrado County was then able to obtain an indictment charging Africanus L. M. Marpleh and Andrew Redd with the crime of grand larceny, and Henry Roberts as accessory after the fact to grand larceny. After appellants, together with Andrew Redd, were indicted during the May 1968 Term, the case came up for trial during the August 1968 Term of the First Judicial Circuit Court, Criminal Assizes, Montserrado County.

When the case was called for trial by Judge Robert G. W. Azango, the resident circuit judge presiding by

assignment, defendant Andrew Redd filed an application for severance, which was granted by the judge. Thereafter, the case proceeded, and after the trial, which consisted of testimony of witnesses for the prosecution, the jury returned its verdict, adjudging both appellants guilty of the crimes as charged. After surrounding themselves with the several safeguards provided by law for perfecting an appeal, the case was properly brought before this Court upon a bill of exceptions consisting of nine counts.

Let us now examine the exceptions taken to the several rulings of the trial judge. The first has to do with a question put to a prosecution witness on direct examination:

"Q. Please say also whether or not the government checks carries him as payee?"

The defendants objected to this question on the ground that the checks would be the best evidence to determine the facts being solicited by the question. The court overruled the objection on the ground that the direct examiner has the right to elicit from a witness facts not brought out in his statement in chief.

Let us look at the series of questions and answers that immediately preceded this:

"Q. Please say, if you can, whether or not the checks used by co-defendant Marpleh to pay for the goods received from you were private checks or government checks.

"A. Mostly government checks.

"Q. Please say, also if you can, whether or not the government checks carried him as payee?"

From the questions and answers thereto, it can readily be seen that the checks allegedly forged and the funds taken were the main points against appellants; therefore, the checks would best serve the purpose of stating whether the defendant, Marpleh, was therein named as the payee. No evidence should be admitted which sup-

poses the existence of better evidence that may be adduced at the trial. Civil Procedure Law, 1956 Code 6:685. Irrespective of this fact a look at the record clearly shows that the answer elicited from the particular witness was not of a harmful nature so as to constitute a particular ground for reversal.

Count two of the bill of exceptions is concerned with the judge's ruling on an objection to a query put to prosecution witness S. A. Saoud, a merchant. Here, the merchant was asked by defendant's counsel if codefendant Roberts concealed or aided Marpleh that he may avoid or escape arrest, trial, punishment or conviction. In ruling, the trial judge held that S. A. Saoud would not be the best evidence, for Roberts himself constituted the source of better evidence.

This Court has held that in criminal cases the plea of not guilty puts in issue every fact the prosecution is bound to prove, and enables the defendant to cross-examine the witness for the prosecution on all matters touching the cause or likely to discredit him. *Massaquoi* v. *Lowndes,* 4 L.L.R. 260 (1935); *Yancy* v. *Republic of Liberia,* 4 L.L.R. 268 (1935). In the circumstances, the judge of the lower court improperly sustained the objection and his act was harmful to codefendant Roberts, for he had been charged with being an accessory after the fact.

The next point to be argued had to do with count three of the bill of exceptions. Here, one Kindred Williams was allegedly in court during the period while about eight other witnesses testified for the prosecution and, in accordance with the bill of exceptions, his qualification as a witness was then requested by the prosecution. Upon referral to the bill of exceptions we find the following at the end of count three:

> "To which defendants most strongly objected. But your Honor overruled their objections and ordered the witness qualified to testify for the prosecution. To which defendants entered their exceptions. (See

record sheet 12, 14th day session August 15 and 16, 1968.)"

We have scrutinized the record and have found that the testimony of Williams was given during the 5th day's session of court and, therefore, the objections claimed to have been made by defendants on the 14th day's sitting of the court cannot be factually correct.

After the prosecution rested, the defendants moved for a directed verdict, claiming that the state had not established beyond a reasonable doubt the *corpus delicti* of the case of grand larceny. The application was thereupon opposed by the prosecution and denied by the court. The issue, which seems to be one of the most important (since the defendants had no one to depose in their favor), is whether or not the trial judge properly denied the motion.

We must, firstly, determine what the essential elements of proof are, and thereafter examine the facts adduced to determine whether or not they were sufficient to go to a jury for determination or, conversely, if the directed verdict should have been ordered. Now, a look at our Criminal Procedure Law, 1956 Code, tit. 8, § 266, shows,

> "When the facts adduced in evidence justify such a course, the judge may direct the jury to bring in a verdict for defendant."

With this in mind, what elements of proof were necessary?

In all criminal cases it is incumbent upon the state to establish beyond a reasonable doubt these elements: (1) the occurrence of an injury or loss; (2) a criminal agency; and (3) the responsibility of the defendant therefor; or, as is sometimes said: (1) that the act itself was done; and (2) that it was done by the person charged. In other words, the state must prove the *corpus delicti* and identify the person charged with the act. 2 WHARTON'S CRIMINAL EVIDENCE, 11th ed., 1457.

Having thus established the requisites of proof, we must next ask, what are the elements of the crime itself

with which the appellants have been charged? In one instance we are concerned with grand larceny. Let us now turn our attention to our criminal statutes for the necessary elements:

> "Larceny. 1. Any person who: (a) with no color of right steals, takes and carries away the personal goods of another with intent in so doing feloniously to convert said goods to the taker's own use without and against the will and consent of the owner; or (b) with intent to convert such property to his own use, by any trick or artifice induces another to part with the possession of his personal property; . . . is guilty of larceny. 2. Larceny is either grand larceny, where the value of the property stolen is more than fifty dollars, or petit larceny, where the value of the property stolen is fifty dollars or less. 3. Grand larceny is punishable by imprisonment not exceeding seven years. . . . 5. Restitution of the property stolen or the value thereof shall be required." Penal Law, 1956 Code 27:297 (in part).

Having thus established the elements to be proved for larceny, let us next secure the definition of an accessory after the fact, as it relates to grand larceny.

> "2. A person who, after the commission of a felony, harbors, conceals, or aids the offender with intent that he may avoid or escape arrest, trial, conviction or punishment, is an accessory to the felony after the fact." Penal Law, 1956 Code 27:8.
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> "Aiders and Abettors: Punishment.—Any person aiding and abetting any crime, whether actually present or, in fulfillment of the preconcerted end, so situated as to be able to give aid to his associate, shall suffer a punishment not exceeding that imposed upon the principal nor less than half the fine or term of imprisonment imposed upon the principal, in the discretion of the court, according to the degree of his activity or guilt." Penal Law, 1956 Code 27:35.

In the case at bar, the appellants have contended that

there should have been a directed verdict. In other words, they hold that evidence adduced by the prosecution is not possessed of sufficient relevancy and materiality to support the issue, or the evidence is contrary to all reasonable probability, or it is uncontroverted or plain that a verdict other than the one sought by direction, cannot be allowed. *Shamy Corp.* v. *Turkett,* 16 L.L.R. 257 (1965).

Let us now direct our attention to the facts presented at the trial. The first witness to take the stand was Paul Sawsin, official manager to Fred and Ghaby. When asked if he was acquainted with any of the defendants in the dock, he replied that he knew Roberts and that the said defendant, one of the appellants herein, came to his store to facilitate the cashing of checks and he did in fact cash checks personally when he was not the named payee.

One S. Z. Saoud thereupon took the stand and identified himself as a merchant. He claimed, upon questioning as to what he knew about the case, that codefendant Marpleh came to his place of business every week to buy goods in amounts ranging from three to four hundred dollars. He would make partial payment in cash and the residue in checks. Continuing, the witness said,

> "Afterwards he explained to me that he was making LPA with the employees of the judiciary branch of government. So he had to issue slips to sundry persons authorizing me to pay them the amount of goods named in the slips, whether it's for zinc, roofing or cardboard. And at the ending of the month he would send me few checks for the amount that he took before. Sometimes he used to send his house boy with a list of the goods he needed along with checks. Sometimes he used to come himself and buy goods, paid some in cash and some in checks. And at one time he said to me that he was building a house out of town. He came and bought about $400.00 material. He said he wanted to pay by installment, so every

month, he used to send some checks by his boy and he would tell the boy to tell [*sic*] to take $50.00 and send the balance. Later he paid the balance small, small. *He also used to send his codefendant Roberts to cash some checks for him.* This is all I know." [Emphasis ours.]

The checks were thereupon marked for identification. Upon query by the court it was also brought out that most of the checks sent to witness Saoud by codefendant Marpleh were government checks.

As mentioned earlier in this opinion, Mrs. Danielette Tucker also took the stand and testified as to falsification of the payrolls and vouchers. She additionally testified that upon discovery of the falsified payrolls she expressed to the Court Administrator a desire to examine certain original copies of payrolls. However, on the morning she was to visit the court for this viewing, one Ed Bouey came to her home to inquire about her impending visit to the Temple of Justice, and told her that Mr. Marpleh knew of her anticipated visit and wanted to see her. A pistol was also taken from codefendant Marpleh at that time by Mr. Bouey and subsequently another was taken from him at police headquarters when he was arrested.

One Joseph Merchant, payroll and voucher clerk of the Supreme Court, was called upon to testify. While on the stand he related that the payroll for a fictitious staff at Nimba County had been prepared by him. He additionally stated that the fictitious payroll was prepared by him upon authorization of the Chief of Finance, codefendant Marpleh.

Several female bailiffs in the employ of the Judiciary were then placed on the stand, and when asked of several checks they affirmed that these instruments bore their names. However, the signatures placed thereon for endorsement were not their signatures.

The Reverend Kindred S. Williams, of Sinkor, then took the stand and identified eleven checks which he had

signed. He claimed that they were given to him by co-defendant Marpleh, and after they were cashed the proceeds were turned over to Marpleh.

Upon the issuance of a writ of *duces tecum,* Gladys Helb was called upon to explain who had signed checks, all mailed on February 20, 1968, with the following names and amounts: Sukon Logan, $432.50; Amos Kieh, $345.00; Flomo Jusu, $345.00; Sukon Kollie, $432.50. On the backs of these, and scores of other checks duly identified and introduced in evidence, were the names of K. S. Williams, Marpleh, and Roberts. Incidentally, eleven of the checks made out to others were also identified by Gladys Helb, and showed her signature as the one who endorsed them. After the foregoing testimony, the witness took suddenly ill, thus causing the suspension of the trial for the rest of that day. In actuality, the record is replete with instances wherein witnesses testified that Roberts and Marpleh cashed checks made out to others. It was also shown that the majority of persons to whom these checks were made out were nonexistent individuals. We could continue at length citing instances of this nature.

In the face of this evidence, the defendants felt that they were not needed to take the stand to testify for the purpose of rebutting the evidence against them. We must immediately interject that we are in complete agreement with the proposition that a defendant need not testify in a criminal case. In addition to this, no inference of guilt of the accused may be drawn from his failure to testify in his own behalf. This proposition has been continuously adhered to, for to do otherwise would have the net effect of depriving the individual of the full effect of exercising the constitutional right of not giving evidence against himself.

The point here is, was the evidence sufficient to be put before the jury? Actually, in such instances, what is the scope and purpose of the jury?

"Ordinarily the sufficiency of evidence to prove the main fact of guilt, or any evidentiary fact looking thereto, is a matter within the province of the jury. They are the triers of fact, the sole judges of the weight and worth of the evidence and the credibility of witnesses. The law prescribes certain rules for the guidance of juries in dealing with the evidence, but it accords to them full and unrestricted power to determine what facts are proven, and what not proven when there is substantial evidence tending to establish them, or the evidence pro and con is conflicting, and is not controlled by some fact or circumstance so clearly and fully established as to leave no possible doubt of its existence, and of such character as makes it necessarily rule the whole case; and the credibility of witnesses is for jury determination, and no other, when any link or fact depends upon that question. Its duty is to determine, from all the facts and circumstances, the question of the defendant's guilt or innocence. In other words, when all the evidence is in, the jury is to weigh it and determine whether or not the guilt of the accused has been established beyond a reasonable doubt." 2 WHARTON'S CRIMINAL EVIDENCE, 11th ed., 867.

The question here is, have all the elements of both crimes been proved against the defendants to the exclusion of a rational doubt? In the argument before this bar, counsel for defendants argued that the *corpus delicti* had not been established because the checks were made out to fictitious payees and, therefore, there had been no injury or loss to a particular person. Let us examine this proposition for a moment to determine its legal soundness. The drawer of the several instruments was the Republic of Liberia, by way of the Secretary of the Treasury and the Auditor General. The drawer of the bills of exchange was the Government's depository, the Bank of Monrovia. The payees were fictitious. Now, what is

the legal effect of a fictitious payee? Since our statutes are silent on this point, let us turn to the law of merchant. As regards effecting payment to fictitious payees and the determination of where the loss or injury falls the following applies.

> "A, an employee of the state highway department authenticated to the state treasurer false invoices to a fictitious person which B., A's servant, signed with the name of the fictitious person. . . . Checks were drawn on the invoices by the state to the fictitious person and mailed to an address where A received them and delivered them to B. B endorsed the checks with the name of the fictitious person and cashed them at defendant bank, which collected from the state through the drawee bank. On discovery of the fraud, the state obtained a credit from the drawee bank which assigned its interest to plaintiff now suing to recover the value of the checks. Held: Defendant bank is not liable, as the person who obtained the money was the person the state had intended to pay, and the loss is due therefore to the drawer's error and not to any fault of the bank. *Hartford Accident & Indemnity Co.* v. *Middletown National Bank,* 126 Conn. 179, 10 A (2nd) 604." BEUTEL'S BRANNON NEGOTIABLE INSTRUMENTS LAW, 7th ed., § 9(3).

Brannon in the same treatise has held the following in respect to instruments held payable to bearer because the fiction of the payee was known to the person signing. Then the sequence of events were as follows:

> "A clerk had a power of attorney to draw checks on his employer's bank account. The clerk fraudulently drew checks to X, an existing person, who had no interest in the checks and was not intended to receive them. (as was the case with Henriette Ado Wright and the other female bailiffs—the court) The clerk indorsed the name of X and negotiated the checks for his own purposes, and the drawee bank paid them in

good faith. Held, that the payee was a fictitious person within the section, that the checks were payable to bearer and that the payment by the bank was rightful." *Smyder* v. *Corn Exchange National Bank,* 221 Pa. 599. BRANNON'S, *id.*

The quotation further substantiates the position that when an instrument is drawn with a fictitious payee named therein, the particular instrument then becomes a bearer instrument to all intents and purposes.

"Fictitious Payee. The rule is well settled both under the common law and the English and American negotiable instruments acts, that as against a bona fide holder, where a note or bill containing all the elements of negotiability is knowingly made payable to the order of a fictitious person, the instrument becomes negotiable without indorsement, and is to be treated as if in terms made payable to bearer. The maker's intention is the controlling consideration which determines the character of such paper. It cannot be treated as payable to bearer unless the maker knows the payee to be fictitious and actually intends to make the paper payable to a fictitious person.

"A payee may be fictitious without regard to whether he is existent or nonexistent, the test being the intent and the knowledge of the maker of the fictitious character of the payee. The rule may be said to be that a negotiable instrument or indorsement made to a fictitious person cannot be treated as payable to the bearer and negotiated without indorsement unless the person making it knows and actually intends to make the instrument payable to a fictitious person.

"The early English cases first formulated the rule that a bill payable to a fictitious person is, by legal intendment, payable to bearer, and may be transferred without indorsement. By the Uniform Act it is provided that an instrument is payable to bearer when

it is payable to the order of a fictitious or nonexisting person, and such fact is known to the person making it so payable. Under the act it does not matter whether the name of the payee used by him is that of one living or dead, or of one who never existed." 7 AM. JUR., *Bills and Notes,* § 95.

"Nonexistent Person. There is no question among the decisions that where the payee in a bill or note is a nonexisting person, known to the maker or person sought to be charged as such, and is purposely used with no intention that he shall have any interest in the note or bill, he is a fictitious payee, within the rule that a note or bill payable to a fictitious payee with the knowledge of the maker or drawer is, in favor of an innocent purchaser, to be considered as payable to bearer. It has been held that where a note or bill is made payable to a nonexisting payee, although in the belief that such a payee actually exists, the payee is fictitious, and the rule making the instrument payable to bearer applies." *Id.,* § 96.

In the circumstances, the person under whose authority the instrument was drawn must be held liable for the larceny. It is difficult to see how defendant Marpleh can escape liability.

We turn now to codefendant Roberts. He has been charged with being an accessory after the fact to the crime of grand larceny. Our Penal Law as it relates to accessories after the fact is declarative of the common law. In the circumstances we feel it best to quote *in extenso* from the common law to aid in a proper determination of this particular issue.

"An accessory after the fact is, by the common law, one who, knowing that a felony has been committed, receives, relieves, comforts, or assists the felon, or in any manner aids him to escape arrest or punishment. The same definition holds good under modern statutes. However, a person who aids an offender in making or

preparing his defense or procures bail for him, even though he afterward escapes, does not come within this definition. In order to fix the guilt of a party charged as accessory after the fact it is essential that a felony has been committed and that it is complete. Until a felony has been consummated, any aid or assistance rendered to a party in order to enable him to escape the consequences of his crime will not make the person affording such assistance guilty as an accessory after the fact. Another requisite to the conviction of a person as accessory after the fact is that he know of the felony and that the person aided is the guilty party and intends to shield him from the law. The authorities are not agreed as to whether it is necessary, in order to constitute one who harbors or protects a person an accessory after the fact, that an indictment or other judicial proceeding be pending against the principal at the time of such harboring or protection. The better rule, however, would seem to be that the pendency of proceedings against the principal offender is not requisite to render one an accessory after the fact." 14 AM. JUR., *Criminal Law,* § 102.

"Manner of Aiding. Whether one is an accessory after the fact depends on whether what he did was a personal help to the offender to elude punishment. He need only aid the criminal to escape arrest and prosecution; it is not necessary that he aid him to effect his personal escape or concealment. This rule, however, does not render one an accessory after the fact who, knowing that a crime has been committed, merely fails to give information thereof. Nor will the act of a person, having knowledge of facts concerning the commission of an offense, in falsifying concerning his knowledge ordinarily render him an accessory after the fact. Where, however, the concealment of knowledge of the fact that a crime has

been committed or the giving of false testimony as to the facts is made for the purpose of giving some advantage to the perpetrator of the crime, not on account of fear, and for the sake of advantage to the accused, the person rendering such aid is an accessory after the fact." *Id.* § 103.

From the foregoing and especially section 103, it is seen that it is the manner of aiding the principal that determines the guilt of the accessory. There must be some assistance rendered the principal felon by the accessory *subsequent to* the commission of the felony. But the crime must be complete at the time of assistance by the accessory. Where, however, one actively participates in the commission of the act itself and this participation constitutes an integral part of the initial felonious act, then the doer is under our law a principal, amenable to the same punishment as the prime doer or principal felon. Penal Law, 1956 Code 27:7.

In the case at bar, the evidence clearly shows that Roberts himself actively participated in the felony. He would remove certain checks from the "stack of checks" that he received from the Disbursing Office of the Treasury prior to turning the "stack" over to the payroll clerk of the Supreme Court. Some of these checks thus received were subsequently negotiated by him. The conversion thereupon became complete, the element of *lucri causa* being constructively present, especially so in the absence of any evidence to the contrary.

With the evidence as has been revealed, we see no possibility of affirming the judgment of the lower court in the conviction of coappellant Roberts for the commission of the crime of accessory after the fact to grand larceny. There is a marked variance between the indictment and the evidence advanced at the trial. *A fortiori,* this Court, in accordance with statute, finds itself duty bound to reverse the judgment of the lower court as it relates to coappellant Roberts.

Therefore, it is our conviction that the judgment of the lower court be reversed as regards coappellant Roberts and he be discharged without day, but the judgment is affirmed as regards coappellant Marpleh. And it is hereby so ordered.

Affirmed as to Marpleh;
reversed as to Roberts
who is discharged forthwith.